IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.387 OF 2005

Air India Ltd. ...Petitioner.

Versus

L.R. Solanki and Anr. ...Respondents.

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Mr. S.K. Talsania with Mr.Anurag H. Gokhale i/b. M.V. Kini & Co. for the Petitioner.

Mr. S.G. Kudle for Respondent No.1.

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CORAM : DR. D.Y. CHANDRACHUD, J.

April 11, 2005.

ORAL JUDGMENT:

This Petition is directed against an order of the National Industrial Tribunal of 22nd July 2004 declining to grant its approval

upon an application under Section 33(2)(b) of the Industrial Disputes Act, 1947.

2. The First Respondent was appointed as a Sweeper in the Inflight Service Department of Air India on 4th October 1977 and was confirmed in service with effect from 1st October 1978. on 1st October 1991, he was promoted as Handyman (Safai) and was deemed to have been confirmed with effect from 1st July 1991. On 30th October 1993, the First Respondent was on duty in the third shift commencing from 2300 hours in the Catering and Cabin Service of Air India at Mumbai Airport. An incident is alleged to have taken place in which the First Respondent, along with an employee by the name of S.V. Godambe who was an Assistant Cabin Supervisor proceeded in a Jeep towards an Aircraft, VT-EEO, which had operated Flight AI-710 from Dubai to Mumbai and which was parked at Bay 66. At about 2300 hours, the First Respondent and his co-employee are alleged to have entered the Aircraft and to have removed two cloth bundles consisting of 92 contraband gold bars and

to have thereafter alighted from the Aircraft and proceeded back to the Jeep. The First Respondent and a co-employee were accosted by C.S. Pereira, a Customs official who was on duty and who, as the evidence of the enquiry would show, had intelligence information about the unlawful activity which was to take place that night. Despite Pereira calling upon the occupants to stop the Jeep, this was not done and the occupants fled away from the scene of incident in the Jeep. The Jeep was eventually apprehended at the Taxi Gate and Godambe was taken into custody. He in turn stated that the First Respondent was the other person who was present with him in the Jeep and that he was working on an Aircraft belonging to Delta Airlines. The First Respondent was apprehended and it is alleged that in the course of interrogation, he confessed to his involvement and led the Investigating Party to the residence of a person by the name of Winjuda at Marol where a recovery of 92 gold bars was effected. The contraband weighed 10,727.2 Grams valued at Rs.48,70,149/- in the local market. Winjuda is stated to have admitted before the Customs Officers that the gold bars were handed over by

the First Respondent after the consignment arrived in the Aircraft which came from Dubai.

3. The First Respondent was placed on suspension pending an enquiry on 1st November 1993. On 3rd March 1994, he was chargesheeted in a disciplinary proceeding involving misconduct inter alia of dishonesty in connection with the business of the employer, and an act subversive of discipline under the provisions of the Central Model Standing Orders framed under the Industrial Employment Model Standing Orders Act, 1946. Evidence was adduced in the course of the departmental enquiry. On behalf of the management, evidence was inter alia adduced of two Investigating Officers of the Customs Department, C.S. Pereira and Subodh Kumar. The First Respondent stepped into the witness box in support of his defence. The Enquiry Officer held that the charges of misconduct were proved and on 31st July 1996, a copy of the Enquiry Officer's Report was forwarded to the First Respondent calling upon him to show cause as to why the findings should not be accepted.

The First Respondent submitted his reply on 28th February 1997. The Competent Authority passed an order on 28th September 1997, imposing the penalty of dismissal upon the First Respondent. The order was communicated to the First Respondent on 3rd December 1997 together with a cheque in the amount of Rs.8,708/- being wages of one month which were paid with reference to the provisions of Section 33(2)(b) of the Industrial Disputes Act, 1947. The Petitioner filed an approval application on 3rd December 1997. By the impugned order, the Presiding Officer of the National Industrial Tribunal has declined to accept the approval application.

4. The National Industrial Tribunal, while rejecting the approval application, has held that the Petitioner failed to comply with the mandatory provisions of Section 33(2)(b) for the reason that the annual increments that were claimed by the workman during the period of suspension had not been taken into account, in computing his wages of one month. The Tribunal relied upon Model Standing Order 14(4)(c) for coming to the conclusion that the workman was

entitled to all his increments in computing his wages for a period of one month. The Tribunal was additionally of the view that this interpretation was justified by the definition of "wages" contained in Section 2(rr). On merits, the Tribunal held that the principles of natural justice had not been complied with since (i) The confessional statement of the workman to the Customs authorities was not proved; (ii) The panchanama relating to the seizure of the gold had not been proved in the enquiry. The Tribunal held that the findings of the Enquiry Officer were perverse since inter alia no one had actually witnessed the First Respondent bringing or carrying gold when he alighted from the Aircraft.

5. Rule was issued in the petition on 14th February 2005. The Petition was posted for interim relief after the First Respondent filed his reply. When the petition came up for the grant of interim relief, Counsel appearing on behalf of the Petitioner and the First Respondent requested the Court that the petition may be taken up for hearing and final disposal with their consent. Accordingly, the

petition has been heard finally with the consent of the Counsel for the Petitioner and the First Respondent. Counsel for First Respondent waived service of the Rule.

6. Counsel appearing on behalf of the Petitioner submits that the Tribunal is in error both on its finding that there was a breach of the mandatory requirement of Section 33(2)(b) and on the view which it took on merits in arriving at the conclusion that there was a breach of the principles of natural justice and a perversity in the findings of the enquiry. Counsel submitted that in computing the wages which were due and payable under Section 33(2)(b), the workman would not be entitled to increments during the period of suspension since these are not payments to which the workman is entitled to as a matter of right and the entitlement of the workman to receive increments would depend upon the outcome of the disciplinary proceeding and the manner in which the period of suspension is to be treated upon conclusion of enquiry. Moreover, it was urged that the Tribunal was manifestly in error in relying on Model Standing Order 14

(4)(c) as ex-facie those provisions have no application to the present case. Finally, it was urged that on merits, the Tribunal had to consider in an application under Section 33(2)(b) whether there was a prima facie case. Counsel urged that the Tribunal has exceeded its jurisdiction in going into a detailed evaluation of the evidence on the record and in any event, the Tribunal clearly ignored the position that a disciplinary enquiry is not bound by the strict rules of evidence or the rules which govern a criminal trial. On the other hand, Counsel appearing on behalf of the First Respondent submitted that the Tribunal has considered and evaluated all the circumstances of the case and the interpretation which has been placed by the Tribunal on the meaning of the expression “wages” in Section 33(2)(b), read with Section 2(rr), is a correct interpretation which does not warrant interference by this Court. Counsel submitted that the finding that is arrived at by the Tribunal to the effect that there was a breach of the principles of natural justice and of a perversity in the findings by the Enquiry Officer was amply borne out by the material on the record and should not be interfered with. Finally, it was submitted that Air

India has paid increments while computing the wages of one month that are due and payable to certain other employees when an approval application was filed under Section 33(2)(b).

7. In considering the rival submissions which have been urged before the Court, it would at the outset be necessary to keep at the forefront the nature of a proceeding under Section 33(2)(b). In an approval application that is filed before the Tribunal under Section 33 (2)(b), it is settled that the Tribunal has to consider as to whether a prima facie case has been made out as regards the validity of the domestic enquiry that is held against the delinquent. In determining whether a prima facie case has been made out, the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on the evidence. In other words, the Tribunal ought not to substitute its own judgment for the decision in question if the view that has been taken by the the disciplinary authority is a possible view on the evidence on the record. These

principles which were laid down by the Supreme Court in **Martin Burn Ltd. v. R.N. Banerjee**, (AIR 1958 SC 79) have since been followed, most recently in **Cholan Roadways Ltd. vs. Thirugnanasambandam,** (2005) 3 SCC 241. At the same time, compliance with the conditions that are stipulated in Section 33(2)(b) is mandatory and a failure to do so will render the action which is proposed invalid. In **Jaipur Zilla Sahakari Bhoomi Vikas Bank Ltd. Vs. Shri Ram Gopal Sharma,** (2002) I CLR 789, the Supreme Court has held that the act of passing an order of dismissal or removal, the payment of one month's wages and the filing of an application should be treated as part of one transaction. A failure to do so would render the dismissal or removal nonest.

8. Section 33(2)(b) inter alia permits an employer, during the pendency of proceedings before a Conciliation Officer, Board, Administrator, Labour Court, Tribunal or National Tribunal to discharge or punish whether by dismissal or otherwise for any misconduct not connected with the industrial dispute subject to certain

conditions. The action of the employer has to be in accordance with the Standing Orders applicable to a workman concerned in such dispute and where there are none, in accordance with the terms of the contract whether express or implied. The proviso to Section 33(2)(b) stipulates thus :

> "Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

The proviso requires the employer to pay to the workman wages for one month and to move an application to the authority before which the proceeding is pending for approval of the action taken. The expression "wages" is defined in Section 2(rr) of the Industrial Disputes Act, 1947 as follows:

> "'2(rr) "wages" means all remuneration capable of being expressed in terms of money, which would, if the terms of

employment, express or implied, were fulfilled, be payable to a workman in respect of his employment or of wok done in such employment, and includes -

-(i) such allowance including dearness allowance as the workman is for the time being entitled to;

-(ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles;

-(iii) any travelling concession;

-(iv) any commission payable on the promotion of sales or business or both;

but does not include-

-(a) any bonus;

-(b) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the workman under any law for the time being in force;

-(c) any gratuity payable on the termination of his service;"

The expression wages has been defined to mean all the remuneration capable of being expressed in terms of money and which would be payable to a workman in respect of his employment or of work done in such employment if the terms of employment express or implied were fulfilled. The intention of the legislature in incorporating this provision was noted by the Supreme Court in **Syndicate Bank Limited. vs. Ram Nath Bhat,** 1967 II LLJ 745 as being to soften the rigour of unemployment that will face the workman, against whom an order of discharge of dismissal has been passed. The wages of one month, the Supreme Court has held, are conceptually for the month to follow the month of unemployment; wages for the month following the date of dismissal and not a repetitive wage of the month previous to the date of dismissal.

9. The issue as to what would fall for classification within the expression “wages” has been considered in a number of cases decided by the Supreme Court. In **Bennett Coleman & Co. vs. Punya Priya Das Gupta,** (1969 II LLJ 554), the Supreme Court held that a car allowance and the benefit of a free telephone and newspaper were allowances which would be included in the concept of wages under Section 2(rr) because these were in that case payable whether or not the employee had used the facility in or in connection with his work. On the other hand, in **Dilbagh Rai Jarry vs. Union of India** (1974 I LLJ 164), it was held that Travelling Allowance or Running allowance would be paid to the employee only if he had travelled or run and not otherwise and was, therefore, not an allowance within the meaning of Section 2(rr). These decisions were considered in a subsequent decision of three Learned Judges in **Bharat Electronics Ltd., Bangalore vs. Industrial Tribunal, Karnataka, (**1990 II LLJ 32), where the Supreme Court held that an allowance which from the terms of employment flows as not contingent on actual working is

part of wages for the purposes of Section 33(2)(b), but an allowance which is earned only by active serving is not an allowance which will form part of wages. In **Bharat Electronics** the Supreme Court held that the workman had to earn the night shift allowance by actually working in the night shift and his claim to that allowance was contingent upon his reporting to duty and being put to that shift. The night shift allowance did not automatically form part of wages and it was held that the Tribunal fell into an error in declining to grant its approval under Section 33(2)(b) for the reason that the aforesaid allowance had not been determined in computing the wages of one month.

10. Section 2(rr), it must be noted, creates a legal fiction. By the legal fiction that is created wages are defined to mean all remuneration capable of being expressed in terms of money, which would be payable to a workman in respect of his employment or of the work if the terms of employment were fulfilled. The earning of increments during the period of suspension does not follow

automatically or as of right. In this case there is no evidence to the effect that increments during the period of suspension were automatic. In fact, the Standing Orders would show otherwise. The question as to whether a workman would be entitled to increments depends upon the outcome of the enquiry for it is only upon the conclusion of the enquiry that the disciplinary authority will determine as to how the period under suspension should be treated. In this connection, it would be material to advert to the provisions of the Model Standing Orders. Model Standing Order 14(4)(c) provides as follows :

> "(c) If on the conclusion of the inquiry or, as the case may be, of the criminal proceedings, the Workman has been found guilty of the charges framed against him and it is considered, after giving the Workman concerned a reasonable opportunity of making representation on the penalty proposed, that an order of dismissal of suspension or fine or stoppage of annual increment or reduction in rank would meet the ends of justice, the employer shall pass an

order accordingly;

PROVIDED that when an order of dismissal is passed under this clause, the Workman shall be deemed to have been absent from duty during the period of suspension and shall not be entitled to any remuneration for such period, and the subsistence allowance already paid to him shall not be recovered:

PROVIDED FURTHER that where the period between the date on which the Workman was suspended from duty pending the inquiry or investigation or trial and the date on which an order of suspension was passed under this clause exceeds four days, the Workman shall be deemed to have been suspended only for four days or for such shorter period as is specified in the said order of suspension and for the remaining period he shall be entitled to the same wages as he would have received if he had not been placed

> under suspension, after deducting the subsistence allowance paid to him for such period." (emphasis supplied).

The first proviso to Model Standing Order 14(4)(c) is significant because it stipulates clearly that where an employee is dismissed in pursuance of a disciplinary enquiry, he shall be deemed to have been absent during the period of suspension and that he shall not be entitled to any remuneration save and except that the subsistence allowance which is paid shall not be recovered. The subsistence allowance under Section 10A of the Industrial Employment (Standing Orders) Act, 1946 is, it may be noted, to be paid at a certain percentage of the wages to which the workman was entitled immediately preceding the date of suspension. It is those wages which form the basis for the computation of subsistence allowance. The first proviso to Model Standing Order 14(4)(c) also demonstrates that there is no question or occasion of a workman who is dismissed from service, earning any remuneration save and except for the

subsistence allowance and as such the workman is not entitled to the payment of increments during the period of suspension.

11. The Tribunal in the present case, placed a great deal of emphasis on the second proviso to Model Standing Order 14(4)(c). The Tribunal is in serious error in doing so. The second proviso to Model Standing Order 14(4)(c) deals with a situation where the workman has been suspended initially pending a disciplinary enquiry and thereafter, after the conclusion of an enquiry, investigation or trial an order of suspension is passed against him as a penalty in excess of four days. In such a case, the workman is to be deemed to have been suspended only for a period of four days or for such shorter period as is specified and for the remaining period, he would be entitled to the same wages. Hence, the second proviso deals with a situation where after the conclusion of a disciplinary enquiry, the penalty of suspension is imposed upon the workman. The Model Standing Orders take care of such a case by providing that for the period of suspension in excess of four days, the workman would be

entitled to his wages. This has no application in the facts of the present case where the penalty is one of dismissal and ex-facie, the Tribunal was in clear error in relying upon the provisions of the second proviso to hold that the workman would be entitled to increments during the period of suspension. The fact that Air India may have taken service increments into account while computing the wages of one month payable to some other employee or employees under the proviso to Section 33(2)(b) is not dispositive of the question as to whether it is bound to do so as a matter of law. The question which arises in this case is whether not paying increments in computing wages of one month would vitiate the order of dismissal where the increments relate to a period during which the employee was under suspension.

12. In so far as the merits of the present case are concerned, the Tribunal was of the view that there was a breach of the principles of natural justice on the ground that (i) the confessional statement was not proved and (ii) the panchanama was not proved in the

disciplinary enquiry. The finding of perversity is principally premised on the basis that no one had seen the chargesheeted workman while bringing or carrying gold when he alighted from the Aircraft. While considering the evidence in the present case, the Tribunal first and foremost, ought to have borne in mind that its jurisdiction in an approval application under Section 33(2)(b) was to determine whether a prima facie case has been made out as regards the validity or otherwise of the domestic enquiry. The Tribunal's jurisdiction is confined to a prima facie evaluation since upon the grant of its permission or approval, the order of discharge or dismissal is subject to challenge in the course of an adjudication under Section 10 of the the Industrial Disputes Act, 1947. The second important circumstance which the Tribunal ought to have borne in mind is that in a disciplinary enquiry the strict rules of evidence which apply to a criminal trial are not attracted. The standard of proof is not proof beyond reasonable doubt but proof on a to preponderance of probabilities. Undoubtedly, the inferences which are drawn by the Enquiry Officer cannot be based on conjecture or surmise, but it is

equally necessary to bear in mind as the Supreme Court held in **Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi**, (1991) 2 SCC 716, that in grave cases like forgery, fraud, conspiracy and misappropriation, direct evidence would seldom be available. These principles were reiterated by the Supreme Court in **Cholan Roadways** (supra).

13. In the present case, there was evidence of the Customs Officer, C.S. Pereira who deposed that on 30th October 1993 at 2000 hours when he reported for duty, he was given certain information about contraband on a flight from Dubai which was parked in a remote bay. The officer along with a dog handler from his department kept a surveillance from a distance. While he was checking the documents of certain passengers who had arrived from a flight from Tokyo and which also in a remote bay, he saw a Jeep coming towards the Air India aircraft in question which was parked in the adjoining bay. The officer alerted the dog handler and observed the movements of the Jeep and saw two persons getting down from the

jeep and proceeding inside the aircraft. After about 15 minutes one of those persons came down from the aircraft and sat in the jeep and shortly thereafter the other person came down and sat in the jeep. The Officer and the dog handler immediately accosted the two persons at the jeep and told them to stop. The jeep, however, is stated to have sped away. The Customs Officer thereafter, took necessary steps to issue an alert and the jeep was apprehended at the taxi gate. Godambe who was one of the persons who was in the jeep was unable to give a satisfactory answer. Upon being apprehended and on being questioned as to the identity of the other person who had been sitting next to him, he mentioned the name of the First Respondent and stated that he was working at a Delta Airlines aircraft at the airport. The First Respondent was interrogated and it is stated that he confessed that the contraband had been kept at a place in Marol at the residence of one Winjuda whom he knew. The Customs Officer deposed that initially when the party proceeded to Winjuda's residence, he feigned ignorance but on being confronted with the confession that was made by the First Respondent, he

allowed the party into his house from where the contraband gold was recovered. The second witness for the Department was Subhod Kumar who was also attached to the Air Intelligence Unit of Customs. He was present at the residence of Winjuda where a recovery of 92 gold bars was made with foreign markings and in the examination, the witness stated that the First Respondent showed the residence of Winjuda from where a recovery was made. These statements can be compared with the deposition of the First Respondent. In the course of his deposition, the First Respondent stated that he had been made to sign his confessional statement under duress. What is material is that in the course of his Examination-in-Chief, the First Respondent stated that the Customs Officer had during the course of his interrogation informed him that he would read out a set of names and he wanted the First Respondent to state if he knew anybody by any name in the list. At a particular point of time when the list was being read out, the First Respondent heard the name of Winjuda who he stated was a colleague working with him. The First Respondent stated that he identified the aforesaid workman and that he would be

able to point out the residence of Winjuda. At the behest of the First Respondent the investigating party was taken to the residence of Winjuda where according to the First Respondent, a cloth packet was recovered. The Tribunal has laid a great deal of emphasis on the fact that the confessional statement that was made before the Customs Officer and the panchanama were not proved in the course of the disciplinary proceeding. Even in a challenge to action taken in a disciplinary proceeding the question before the Industrial Tribunal is as to whether there is some evidence on the record to establish the charge of misconduct. Here the Tribunal was considering an application under Section 33(2)(b). In the present case, at least on a prima facie evaluation for the purpose of an application under Section 33(2)(b), it cannot be said that there was no evidence at all to link the First Respondent with the charge of misconduct. The presence of the First Respondent at the scene of offence is admitted since it is an admitted position that the First Respondent had in fact, entered the aircraft which arrived from Dubai. It may well be, as one of the witnesses stated, that he had not actually seen the First Respondent

carrying any contraband on his person when he was alighting from the aircraft. In a disciplinary proceeding, however, it would be far fetched to require that the management must prove every possible link in a chain of unlawful behaviour. Apart from the presence of the First Respondent, the fact that (i) he was present in the jeep which had sped away upon being accosted by the Customs Officer; (ii) the First Respondent was identified as being the person in the jeep by the co-workman, Godambe; (iii) upon being apprehended the First Respondent had, out of a list of names, identified the name of Winjuda and had led the Customs Party to his residence from where a seizure of 92 gold bars has been made, are the circumstances which at the prima facie stage were sufficient to justify the grant of approval in the application under Section 33(2)(b). The Tribunal has launched upon an elaborate evaluation of the facts and circumstances: something which it was not justified in doing both having regard to the limited nature of the jurisdiction under Section 33(2)(b) and the limited nature of the jurisdiction when dealing with the evaluation of evidence in a disciplinary enquiry. In the circumstances, I am of the

view that the interference of this Court under Article 226 is warranted in order to correct a clear transgression by the Tribunal of the limits of its own jurisdiction under the law laid down by the Supreme Court.

14. The Petition is accordingly allowed. The impugned order of the Tribunal dated 22nd July 2004 is quashed and set aside. The approval application filed by the Petitioner under Section 33(2)(b) of the the Industrial Disputes Act, 1947 (Approval Application No.NTB 65 of 1997, arising out of Reference NTB.1 of 1990) shall stand allowed. However, it is clarified that the First Respondent would be at liberty to espouse all the remedies that are available in industrial law. In the circumstances of the case, there shall be no order as to costs.

15. Stay refused.

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